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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB -9 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KRISTINA H.,)	2 CA-JV 2011-0096
)	DEPARTMENT A
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC)	Appellate Procedure
SECURITY, MICHELLE H., and)	
RICHARD H.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J19671900

Honorable Geoffrey Ferlan, Judge Pro Tempore

AFFIRMED

Thea M. Gilbert

Tucson
Attorney for Appellant

Thomas C. Horne, Arizona Attorney General
By Laura J. Huff

Tucson
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Arizona Department of Economic Security

B R A M M E R, Judge.

¶1 Kristina H., mother of Michelle and Richard, born in October 2010 and October 2008, respectively, appeals from the juvenile court's order terminating her parental rights to the children based on the length of time in court-ordered care, six months for children under the age of three. A.R.S. § 8-533(B)(8)(b). She contends the court erred in viewing her telephonic appearance at a facilitated case conference as a failure to appear. She also challenges the sufficiency of the evidence to support the court's finding that termination of her parental rights was in the children's best interests.

¶2 Although we are troubled by the way the juvenile court handled this matter, we ultimately affirm because, as to the principal issue troubling us, the adequacy of notice to Kristina, she did not articulate this issue to the juvenile court in a manner that it either could be addressed or preserved for appeal, and she failed to raise it at all as an issue on appeal. As to the issues she did raise on appeal, we conclude, although the case is a close one, that the court did not abuse its discretion in reaching its decision.

¶3 Viewed in the light most favorable to sustaining the juvenile court's order, *see Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 12, 153 P.3d 1074, 1078 (App. 2007), the evidence established the following. Kristina and her family had a history of involvement with Child Protective Services (CPS) agencies in Florida and Ohio before Arizona's CPS first became involved in December 2009. Michelle and Richard, as well as Kristina's three older children, were removed from her home in December 2010 because she was unable to protect or care for them. Kristina admitted there was domestic violence in the home perpetrated by Richard H., the father of all but Kristina's eldest child. The children were filthy at the time they were removed, and Kristina, who apparently had been diagnosed as mildly mentally retarded, was overwhelmed by the children and unable to care for them. When the case manager

visited the home before removing the children, Kristina's daughter Angelica was lying on the bathroom floor and was unresponsive. She was taken to a local hospital where it was determined she was severely dehydrated and suffering from a stomach virus.

¶4 Kristina's five children were adjudicated dependent as to Kristina in April 2011. The juvenile court found Kristina had been unable to meet the needs of the children and had failed to protect them from domestic violence; all but Michelle had been physically abused by Richard. Although the initial case plan goal was reunification and the Arizona Department of Economic Security (ADES) had offered Kristina services designed to assist her in attaining that goal, she did not avail herself of those services and rejected any efforts to help her. It appears the court held a permanency planning hearing on June 7, 2011, although the minute entry dated June 7 was signed by the court on June 20 and filed with the court on June 21. In any event, after the hearing, the court found Kristina was not in compliance with the case plan and changed the case plan as to Michelle and Richard from reunification to severance and adoption. On June 10, 2011, ADES filed a motion to terminate Kristina's parental rights to Michelle and Richard on the ground they were under the age of three, had been out of the home pursuant to court order for six months or longer, and Kristina had substantially neglected or willfully refused to remedy the circumstances that caused the children to remain out of the home.¹ ADES alleged Kristina had refused the panoply of services ADES offered her.

¶5 At the July 21 initial severance hearing, the juvenile court scheduled for August 19 a facilitated case conference (FCC) with a mediator and a "Status Hearing" in front of the court, and had notified Kristina the status hearing was set for 11:30 a.m., after

¹The motion alleged the same ground for terminating the rights of the children's father, Richard. Richard is not a party to this appeal.

the FCC, but that it “may be vacated if [she] appear[ed] for the [FCC].” Kristina failed to appear in person at the August 19 FCC, although her attorney was able to locate her and secure her telephonic appearance. At the beginning of the hearing, the court announced that the 10:00 a.m. time for which the FCC had been set had come and gone, so it opened the proceedings at 10:25. The court then said “the matter was also set for a status adjudication hearing at 11:30.” Then, the court stated that it and the parties had “convened . . . in order to proceed with respect to the status hearing as to [Kristina].” No explanation was given why that hearing was being convened before it had been scheduled to begin. After the court rejected Kristina’s claim that she had good cause for failing to appear personally because of transportation issues involving her vehicle, the court proceeded with the hearing, denying counsel’s request to continue it. ADES submitted exhibits and the case manager testified, after which the court granted ADES’s motion and terminated Kristina’s parental rights to Michelle and Richard, subsequently signing and entering a final, formal order ADES had submitted that included findings of fact and conclusions of law.

¶6 Section 8-537(C), A.R.S., provides that when a parent fails to attend a pretrial conference, status conference, or termination hearing after having been provided proper notice, the court may find the parent waived his or her “legal rights” and proceed with the hearing. The court may also deem admitted the allegations of any petition, or, in this case, the motion to terminate the parent’s rights. *Id.* Rule 64(C), Ariz. R. P. Juv. Ct., essentially mirrors the statute, but adds that the same consequences could result when, without good cause, a parent fails to appear at an initial severance hearing, pretrial conference, status conference, or termination hearing. As we observed in *Manuel M. v. Arizona Department of Economic Security*, 218 Ariz. 205, ¶ 28, 181 P.3d 1126, 1134-35

(App. 2008), the rule provides that by failing to appear, “the parent admits only the factual contentions contained in the motion,” leaving as “a relevant and contestable topic at the hearing” whether “those factual allegations sustain the quantum of evidence required to establish the legal grounds for terminating a parent’s rights.”

¶7 The record establishes that at the June 7 permanency hearing the juvenile court changed the case plan to severance and adoption, and Kristina received, signed and filed with the court a notice entitled “notice to parent in termination action.” The notice informed her she was required to appear “for all termination hearings,” including the initial hearing, pretrial conference, status conference or the termination adjudication hearing, and warned her that if she failed to attend any of these hearings, “the court may determine that you have waived legal rights, and, that you have admitted the allegations in the motion for termination, and may terminate your parental rights to your child based on the record and evidence.” The notice specified the next hearing that had been set was the initial severance hearing on July 21. It admonished her she was required to attend all termination hearings and if she failed to attend a hearing without good cause, the court could “determine” that she had “waived legal rights, and, that [she] admitted the allegations in the motion for termination, and may terminate [her] parental rights to [her] child based on the record and evidence.” The minute entry from the June permanency hearing reflects the court also verbally warned Kristina that if she failed to attend the July 21, 2011 initial severance hearing the case could go “forward in” her absence and her “parental rights” could be terminated.

¶8 Kristina attended the initial severance hearing on July 21, 2011. The minute entry reflects the court set the next hearing, a “Facilitated Case Conference with the mediator” for an hour and thirty minutes, and that the court had given Kristina a

“Notice to Parent in Termination Action,” the same notice described above, which contained essentially the same warning about the possible consequences of failing to attend “all termination hearings.” The minute entry provides, and the court presumably advised the parties, that the father was not required to attend the facilitated case conference. We can infer, then, the court told Kristina she was required to attend, given that efforts would be made to settle the case. The notice specified the next hearing was the facilitated case conference on August 19, at 10:00, and the termination adjudication hearings on September 1 and September 28, at 10:00 and 2:00, respectively. The notice also stated the court would “presume” the party signing it understood the contents, “unless you tell the Court at today’s hearing that you do not understand this notice” and that by signing it she was confirming she had received it. Kristina signed the notice, which was filed and is part of the record before us.

¶9 As noted above, Kristina did not appear in person at the facilitated case conference on August 19, although her attorney had been able to reach Kristina by telephone. Counsel explained to the juvenile court that Kristina had said she was having car trouble and that, in any event, she did not believe the notice she previously had received had that day’s date on it, specifically informing her she had been required to attend. But the court pointed out that the July 21, 2011 notice stated the case was set for a FCC on August 19 and the contested severance hearing was to be held on two days in September. ADES reiterated the court’s observations about the July 21 notice and added that the court had admonished Kristina verbally that she was required to attend the conference and that the case manager would testify she had told Kristina she was required to be present. ADES also pointed out that Kristina had only recently been using a vehicle for transportation to court hearings and previously had used the public transit system,

arguing car trouble was not good cause for Kristina's failure to appear given her "familiarity with the bus" and the fact that she "kn[ew] how to use the bus system."

¶10 After Kristina was placed under oath over the telephone, the juvenile court questioned her about her knowledge of the hearing and her failure to appear. Kristina admitted a friend had taken her "downtown" earlier in the day to look for parts for her car. The court found Kristina knew about the hearing date and that she was required to be present physically, that she "had the ability" to attend the hearing in person, and that neither "the transportation issue" nor any purported "misunderstanding of the date" of the hearing constituted good cause that excused her failure to do so. The court found, too, that Kristina had been warned repeatedly she had to appear.

¶11 The juvenile court found that Kristina's failure to appear personally at the FCC, after having been warned that she must be present, was without good cause and accordingly deemed her to have "admitted the allegations of the petition" to terminate her parental rights. The court then took evidence from ADES; Kristina's counsel offered no evidence. The court made certain factual findings and legal conclusions on the record and in its minute entry of that date, including that Kristina had received notice of the hearing, that she had absented herself voluntarily from the hearing, and was deemed to have admitted the allegations of the motion to terminate her parental rights. The court further found the ground for terminating Kristina's parental rights alleged in the motion had been established by clear and convincing evidence and that termination was in the best interests of Michelle and Richard.

¶12 The form of order ADES subsequently submitted and the juvenile court signed essentially mirrored the findings and conclusions the court had made on the record and in its minute entry. The court found Kristina had "received an admonition notifying

her of the need to attend all court hearings” and that if she failed to appear it “could result in a finding that” she had “waived her legal rights, admitted the allegations in the motion [to terminate her rights] and that the Court could proceed with termination of her parental rights based upon the record presented.” The court concluded Kristina had received proper notice of the hearing because a copy of the notice of hearing and the motion had been mailed to her counsel, pursuant to Rule 5(c)(1), Ariz. R. Civ. P. Unfortunately, there is nothing in the record to support the court’s finding that the notices Kristina had been given permitted it to take those actions.

¶13 The only notices that Kristina either had been provided and signed or given verbally state that she would be deemed to have waived her legal rights, admitted the termination grounds alleged, and permitted the court to terminate her parental rights only if she, without good cause, failed to attend the “Initial Termination Hearing, Termination Pretrial Conference, Status Conference or Termination Adjudication Hearing,” and “an Initial hearing, a Pretrial Conference, a Status Conference or Termination Adjudication.” Although none of these notices state explicitly that she needed to be present physically for these court proceedings, we infer that to be their clear import. But, no notice given Kristina described either a “facilitated case conference” or a “status adjudication hearing” as one of the termination hearings she was required to attend or, if she were found to have no good cause to be absent, she would be deemed to forfeit her right to contest the severance allegations and the court could “terminate [her] parental rights to [her] child based on the record and evidence.” And the notice she received and signed regarding the FCC did not list the date and time set for the status hearing—the hearing the court apparently proceeded with in her absence.

¶14 The only issues Kristina presented the juvenile court were that the notice she had been given did not specify the correct date for the FCC, that because she was on the telephone during the hearing she should not be considered to be absent voluntarily, and that the matter should be continued to permit her to appear in person. Kristina neither questioned the court's acceleration of the status conference nor suggested either that she could be present physically for its scheduled commencement or that it be continued so she could.

¶15 The juvenile court's refusal to continue the hearing, even if briefly, or to permit Kristina to participate in the facilitated case conference telephonically, given that she was already doing so, strikes us as somewhat harsh. But, it is not for this court to replace its judgment for that of the juvenile court. Rather, we are constrained to affirm the juvenile court if reasonable evidence supports any findings of fact that are the basis for its ruling. *See Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004) (reviewing court does not reweigh evidence but defers to juvenile court's factual findings); *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002) (reviewing court will affirm juvenile court if factual findings upon which order based supported by reasonable evidence and order not clearly erroneous). On appeal Kristina seems to be arguing that when a parent appears telephonically, that should constitute an appearance for purposes of the statute and the rule. But this is not the same argument Kristina made below. Rather, she tried to persuade the juvenile court that there was good cause for her failure to appear personally, an implicit if not express concession that her personal appearance had been required. She argued that it was simply unfair for the case to proceed in that manner, given that she had car problems and she was "available and . . . on the phone." We generally will not

address arguments raised for the first time on appeal. *See Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, n.3, 178 P.3d 511, 516 n.3 (App. 2008).

¶16 We recognize there are strong policy reasons for requiring an appearance be personal and not, without leave of the court, telephonic. Although it is unclear what was to be accomplished at the facilitated case conference, a mediator had been selected at the July 21 initial severance hearing so presumably the parties were to explore settlement. We can certainly understand that if settlement negotiations are to take place, a juvenile court would prefer that they be conducted with the parent physically present. And if any parent is to testify, understandably telephonic testimony does not permit the trier of fact to evaluate the witness's demeanor, expressions, and body language, all of which are material to the assessment of a witness's credibility. *State v. Moore*, 203 Ariz. 515, ¶ 11, 56 P.3d 1099, 1102 (App. 2002). Thus, a juvenile court has the discretion to permit a party to testify telephonically. *See Ariz. R. P. Juv. Ct.* 42; *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 14, 119 P.3d 1034, 1037 (App. 2005). But as ADES points out, Kristina did not seek the court's leave to do so; rather, she simply "appeared" telephonically after she already had failed to appear personally, only appearing after her attorney had been able to find her by telephone. Again, although the result here appears harsh, under the circumstances we cannot conclude the court abused its discretion by finding Kristina lacked good cause to excuse her failure to appear.

¶17 Although the juvenile court concluded Kristina had admitted the allegations of the termination motion based on her failure to appear at the FCC, a hearing not listed on the notices, we must accept the court's determination that it instructed Kristina to appear at the FCC. Kristina did not challenge that determination either below or here, and because she has not raised that as an issue on appeal, she has forfeited it, and we do

not consider it further. *See* Ariz. R. Civ. App. P. 13(a) (brief shall contain issues presented for review and argument with contentions of appellant); Ariz. R. P. Juv. Ct. 106(A) (Rule 13 applies in appeals from juvenile court); *see also Hurd v. Hurd*, 223 Ariz. 48, n.3, 219 P.3d 258, 260 n.3 (App. 2009) (issues not argued properly on appeal waived; relying on Rule 13(a)). Nor has she argued on appeal that the court erred by starting the status conference before it was scheduled to begin. Accordingly, we similarly consider it no further.

¶18 Moreover, Kristina was not prejudiced by any such finding. ADES presented sufficient evidence to support the motion to terminate her parental rights. And, although she was given the opportunity to present evidence on her own behalf at the hearing, she declined to do so. Kristina did not subsequently file a motion to set aside the order pursuant to Rule 46(E), Ariz. R. P. Juv. Ct., and Rule 60(c), Ariz. R. Civ. P., and present to the juvenile court evidence she would have presented had the court continued the hearing to permit her to appear in person, or excused her failure to do so. She has never asserted that her mental condition or other factor contributed to her failure to appear at the facilitated case conference in person. Similarly, she has not offered on appeal any additional defense or evidence that could have been submitted had she not been deemed to have failed to appear or had the court continued the hearing.

¶19 Kristina also contends there was insufficient evidence to support the juvenile court's finding that termination of her parental rights was in the children's best interests. She asserts termination was not the best interests of Michelle and Richard "because there are three siblings who remain in foster care and the Mother continues reunification efforts as to those children." She argues that all five children are in the same placement and if the three older children are returned to her it is possible the

children then would be separated from one another. She also suggests, as she did at the end of the termination hearing, that it was contrary to the children's best interest for the hearing to proceed in the manner it did, that is, with the court deeming her failure to appear as an admission of the allegations of the motion, and, she argued below, to not permit her to testify and appear telephonically. On appeal she maintains the "unjust result" of the possible separation of the siblings "could be avoided" if ADES were to be required to "present evidence of Mother's unfitness and prevail on the merits, which then may or may not be applicable to the remaining siblings."

¶20 We note at the outset that Kristina cites no authority to support these arguments. And to the extent we understand them, we are aware of no supporting authority. In enacting § 8-533(B)(8)(b), the legislature created a special category of length-of-time in court-ordered-care with respect to very young children, an acknowledgement that the passage of shorter periods of time for a younger child in the formative years of development has a greater impact on that child than a similar period of time for an older child. The legislature necessarily understood that a parent's rights to one child might be severed under this subsection but not the rights to another, older child. There is no authority for the proposition that termination of a parent's rights cannot be in a child's best interest unless the same ground for terminating that parent's rights to one child applies equally to all the parent's children. As the youngest of Kristina's five children, Michelle and Richard fell within the provisions of this subsection and terminating Kristina's rights to these children even though a ground might not yet exist for terminating her rights to her other children, did not, as a matter of law or based on this record, negate the court's finding that termination of Kristina's rights to the younger children was in their best interests.

¶21 Nor are we aware of any authority to support Kristina’s apparent suggestion that it is contrary to a child’s best interest to terminate the parent’s rights if the matter has proceeded as if by default because the parent has failed to appear. Rules 64(C) and 66(D)(2), Ariz. R. P. Juv. Ct., as well as § 8-537(C), expressly permit the matter to proceed as it did.

¶22 We conclude there was ample evidence to support the juvenile court’s finding that termination of Kristina’s parental rights was in Michelle’s and Richard’s best interests. Although the evidence must be clear and convincing of at least one of the statutory grounds for terminating a parent’s rights, § 8-537(B), only a preponderance of the evidence must establish that termination is in the child’s best interests, *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We do not reweigh the evidence on appeal, but defer instead to the juvenile court’s factual findings because, as the trier of fact, that court “is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts.” *Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d at 945. Consequently, we will affirm the order if reasonable evidence supports the factual findings upon which the order is based and the order is not clearly erroneous. *See Jesus M.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205. And as we previously stated, we view the evidence in the light most favorable to upholding the juvenile court. *See Christy C.*, 214 Ariz. 445, ¶ 12, 153 P.3d at 1078.

¶23 To establish termination of a parent’s rights is in the child’s best interest, “the court must find either that the child will benefit from termination of the relationship or that the child would be harmed by continuation of the relationship.” *James S. v. Ariz. Dep’t of Econ. Sec.*, 193 Ariz. 351, ¶ 18, 972 P.2d 684, 689 (App. 1998). There was ample evidence supporting the juvenile court’s finding here. That evidence included

various exhibits and the case manager's testimony. The case manager testified that termination of Kristina's parental rights was in the children's best interests because Kristina was unstable and had unresolved mental health issues. She added that if Kristina's rights were terminated, the children's medical, emotional and other needs would be met. She stated that although she had been unable to find a relative placement for the children and the foster parents with whom the children were placed did not wish to adopt the children, they nevertheless were adoptable. *See In re Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 352, 884 P.2d 234, 238 (App. 1994) (evidence child adoptable supports court's finding parental relationship termination in child's best interest).

¶24 The juvenile court's order terminating Kristina's parental rights to Michelle and Richard is affirmed.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge